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Supreme Court of the United States

NO. 878

OCTOBER TERM, 1970

MARY JULIA PARKIN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

Unlike petitioner, it is respondent's view that the only opinion or judgment with which this Court may properly concern itself is that of the Supreme Court of the State of Florida entered on July 13, 1970, as reflected in petitioner's Appendix A - 238 So.2d 817.

There is very little, if any, point in considering what the District Court of Appeal may have said since that opinion has been supplanted or replaced by that of the Florida Supreme Court.

Be the above as it may, it should become readily apparent by the end of this response that whatever view one may take

of which opinion is involved, it very much should follow that no federal questions of any magnitude are involved and the petition for review should be denied.

JURISDICTION

While petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. 1257 (3), she has utterly failed to demonstrate that any right, privilege or immunity which she might claim is her due under the Constitution of the United States either exists or is in such a stage as would jurisdictionally permit this Court to review the matter as a judgment which is "final".

Petitioner candidly admits that there may be a substantial question as to whether the matter on which she seeks this Court's review is "final". Indeed she acknowledges that except under a possible theory that she will suffer irreparable injury if this review is not granted and the ruling be one which finds in her favor. Clark v. Williard, 55 S.Ct. 365, 294 U.S. 211, 79 L.ed. 865, 98 A.L.R. 347; Gumbel v. Pitkin, 5 S.Ct. 616, 113 U.S. 545, 28 L.ed. 1128.

Obviously, respondent takes issue with any suggestion of irreparable injury occasioned by the State of Florida. If injury results to petitioner, it will be

as a result of her own doing and nothing which Florida imposed against her.

Added to the historical sequence by means of which she now seeks this Court's review, is the fact that on or about the 6th of November, 1970, she filed a motion for stay of proceedings in the trial court until her petition for writ of certiorari was acted on by this Court. Shortly thereafter she drafted and filed an amended motion for stay on or about the 10th of November, 1970. On or about the 18th of November, 1970, respondent filed its opposition to motion for stay with this Court.

On November 25, 1970, the office of the clerk of this Court advised counsel for petitioner that Mr. Justice Black denied the application for stay with the following endorsement:

> "Application for stay denied.
> Nov. 25, 1970 S/ Hugo L. Black".

Respondent is unaware of any further action taken in the Circuit Court in and for the Fourth Judicial Circuit of Florida with regard to petitioner's trial.

Indeed, the very fact that this Court inquired as to whether the State of Florida would oppose the granting of a further stay so as to temporarily preclude trial (provisionally set for sometime in January, 1971), indicates that unless the State of Florida was able to demonstrate some reason in addition to the lack of finality that certainly at least the stay would be granted if not review by certiorari. That being so, we stood on the proposition that the decision below was simply not one which ought to have caused this Court to skirt its own oft recited position that it would not grant review by certiorari of non-final judgments. Indeed, no judgment has ever been entered in this case. Beyond the simple possibility of arraignment, it may fairly be said that petitioner has never yet set foot in court as a result of the charge against her, and has, at all times, enjoyed bonded liberty and does as of this date.

Accordingly, it will become patently obvious that since she had opened the door to the matters which may be developed at trial, it is ridiculous (legally and logically) to suggest that the responsibility therefor be assessed against the State of Florida to the extent that she be permitted to go to trial (assuming she will even agree to this) without having to answer the questions of the state's psychiatrists appointed to examine her.

IMPORTANCE AND NATIONAL SCOPE OF QUESTION

We are told by petitioner that this is a vital view because writers have seen fit to discourse thereon. Respondent wonders at whether the vitality of an issue should ever turn on the simple fact that some persons may elect to write (albeit well) on the subject.

If we were discussing the circumstances involved in all those cases cited by petitioner in her brief which hold in her alleged favor or indeed the case of New Jersey v. Whitlow (N.J. 1965), 210 A.2d 763, we might agree that there would be some importance involved to the question. Unfortunately for petitioner the circumstances in which she finds herself have no counterpart in any of the cases on which she ostensibly relies on the merits. Indeed, not even New Jersey v. Whitlow, supra, has within its purview the circumstances extant here. This is true even if we do not take into account the undeniable lack of "finality" of judgment which should be critical even before any of the matters may be reached.

QUESTIONS PRESENTED

Respondent accepts petitioner's questions presented as they appear in her brief at page five, assuming one can put aside the jurisdictional and legal deficiencies with which she comes to this Court seeking review.

CONSTITUTIONAL PROVISION INVOLVED

Obviously the Fifth Amendment to the Constitution of the United States as incorporated by the Fourteenth Amendment to the United States Constitution is the basis of her complaint here--once again assuming we are able to reach the matter for proper disposition in light of her argument.

STATEMENT OF THE FACTS

The statement of the facts set out by petitioner in her brief at pages six through nine is reasonably accurate and tracks those events which occurred and gave rise to the matter presently at issue.

We add, however, that this Court, by and through the person of Mr. Justice Black denied her several motions for a stay of proceedings in the lower court after a response filed by the State of Florida.

ARGUMENT

We consider it noteworthy that petitioner has not elected to rely on simple numerical authority but instead has put forth an extremely well documented effort on what she conceives the better rule to be. We will, of course, not have the benefit of such an effort since being in such a numerically inferior status literally requires a compelling argument on what we consider the merits to be.

The following observations are made in response to petitioner's position:

Because of the unchallenged course of events which gave rise to the issue here being considered, the state finds itself in this predicament: if the petitioner introduces any testimony of insanity, the burden then falls on the state to establish the sanity of the petitioner beyond a reasonable doubt, and if the state fail to present sufficient testimony to overcome that burden, the petitioner is entitled to an acquittal. See Purcell v. State, Fla., 101 So.2d 130. Furthermore, there is an obligation on the court to determine whether or not petitioner is in such a state of idiocy, imbecility, or lunacy as to make it incumbent on such court to see that she is not put on trial. See People v. Pembaur, 15 N.Y.S.2d 215. A duty has also been judicially placed upon the prosecution to insure that the proper pretrial medical examination is secured whenever it has reason to believe that the accused's state of mind will be an issue at trial (51 Geo. L. J., p. 148, citing Winn v. U.S., 270 F.2d 326). Since the petitioner refuses to cooperate with the psychiatrist, refuses to answer any questions propounded by him or to take any tests requiring responses from her, such as are usually given by psychiatrists in order to determine mental capacity, the prosecution has no way to meet its

burden, and the objective above stated is frustrated by a blanket application of the privilege against self-incrimination.

Since oral examination and conversation are almost essential for an expert to form a sound opinion of a person's mental condition, it is obviously difficult to make a complete psychiatric examination of a defendant who refuses to talk. Weihofen on Mental Disorder as a Criminal Defense, page 296.

> "It is obvious, even to the layman, that in all probability a psychiatrist would require more than a mere physical examination of a defendant in order to reach a conclusion of his sanity or insanity. The very nature of the psychiatric study would seem to call for utterances or answers through conversation with the alleged incompetent. The psychiatric interview is the basic diagnostic tool." (Emphasis supplied)
>
> See Krash, "The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia", 70 Yale L. J. 905, 918.

To further emphasize the plight of the prosecution in a situation like this one, attention should be called to two (2) recent Florida decisions and a 1965 Florida statutory enactment. In the case of McCullers v. State, 143 So.2d 909,

the Court held that admission of testimony by state's expert as to defendant's sanity at time of alleged crime was error, where testimony was based in substantial part upon extrajudicial and undisclosed statements made to expert by third persons concerning defendant's actions shortly prior to and immediately following the event. It is true that in the later case of Land v. State, Fla., 156 So.2d 8, the Supreme Court held that "an opinion founded upon the expert's scientific examination of the subject and conversations with third persons, would not be inadmissible, absent a showing that his conclusion was based in major or substantial part upon such conversations". Nevertheless, in the same case, the court held that the extent to which the psychiatrist relied on information obtained through other than first hand observation is an element to be considered by the jury as it assesses the credibility of the psychiatrist's report. Section 90.242, Florida Statutes, places a further handicap upon the examination of a defendant by creating a privilege between a patient and psychiatrist to refuse to disclose communications between patient and psychiatrist although making an exception in cases in which the patient introduces his mental condition as an element of his claim or defense.

Thus, the state is put in this position. Under McCullers, supra, and Land, supra, he cannot rely upon a history given to him by third persons. Hence, he is handicapped in learning the circumstances surrounding defendant's actions

at the time of the crime, knowledge which all psychiatrists deem essential, particularly when the court psychiatrist seldom seeks to examine a defendant until long after the crime was committed. He is handicapped in learning whether the crime was one of passion, or of long premeditation, how the defendant acted immediately before, during and after the commission of the crime, what he said, whether his continuing actions such as plans to escape and avoid detection indicated a cool calculation or irrational recklessness.

In spite of this handicap, sometimes a psychiatrist can make a diagnosis as to mental condition, based on conversations with a defendant, not merely depending upon defendant's relation of the history of the case, but by the very way in which he answers questions, his demeanor, his reactions to various long accepted tests. Now, under the present situation, if she is to be allowed to refuse to talk to the psychiatrist or to refuse to cooperate with him, then the prosecution will be placed in an intolerable situation. If the petitioner can, by a blanket application of the privilege against self-incrimination so frustrate an examination, and the state will be faced with the burden of proof, then the state can look forward only to mass acquittals or reversals. Small wonder that respectable psychiatrists throw up their hands and decline to accept appointments under such conditions.

It is probable that the state will not even be permitted to prove the refusal of the petitioner to cooperate with the psychiatrist at the trial. There appears to be a great deal of difference of opinion on this question depending to a great extent on the statutes in various states. A great deal will depend upon the answer to the main question, ie. whether or not the petitioner can be required to answer in the first place. See 87 ALR 2d 375, note 6. Some states by statute permit comment on defendant's refusal to take the stand but this procedure has been held violative of the Fifth Amendment.

After an extensive search of the authorities, there appear but two or three cases that deal with the question of whether or not a defendant can be compelled to cooperate with the examining psychiatrist. In negative fashion, many courts have indicated that an accused can refuse to cooperate.

> "At this point, it seems necessary to point out that although the question of self-incrimination in mental examinations has generally arisen in cases challenging the constitutionality of the compulsory examination statutes, the more significant question is not whether such an examination can be ordered but whether, once it is ordered, the defendant can be compelled to cooperate with the examining psychiatrist." (Emphasis supplied)

Pre-trial mental Examination Commitment. Some Procedural Problems in the District of Columbia, Vol. 51 Georgetown L. J., p. 143, 152.

Many states have enacted statutes requiring the mental examination of defendants in criminal cases, and there have been many decisions throughout the country upholding the constitutionality of such statutes when they were attacked on the theory of self-incrimination (See annotation in Vol. 32 ALR 2d, p. 445). Although these decisions have almost unanimously upheld the constitutionality of such statutes and included fine sounding statements about the necessity of such statutes, almost invariably these decisions have also included some statement to the effect that the statutes did not require testimonial compulsion. Following are some excerpts illustrating the statement above that courts which, while upholding the constitutionality of the statute, at the same time expressed themselves against testimonial compulsion.

"Examination as Compelling Self-Incrimination.
The constitutional privilege against self-incrimination does not protect a defendant against being required to submit to psychiatric examination to determine his mental condition. While there are some cases to the contrary, the sound rule is that the privilege extends only to testimonial compulsion--to

extracting from the witness' own lips an admission of guilt. It does not exclude his body as evidence when it may be material."

Wiehofen on Mental Disorder as a Criminal Defense, page 293, 294.

"The statutory provision that board appointed by superior court shall examine an alleged sexual psychopath or person accused of specified sex offenses to ascertain whether he is a sexual psychopath is constitutional, and order issued thereunder granting petition for examination of a person charged with enticing a female child was valid, such person being entitled to refuse to answer questions which he thought might incriminate him, as against contention that examination had effect of ordering defendant to testify before examining board with reference to matters which might be incriminating. Laws 1949, c. 314, Section 4."

In re Miller, 95 Atl.2d 116 (N.H.).

"In rejecting an attack on a statute requiring the court to appoint alienists to examine a defendant pleading insanity, the court in People v. Strong (1931), 114 Cal.App. 522, 300 P. 84, pointed out that the law did not require the defendant to submit to an examination, that he could

> stand mute when the experts sought to examine him, and that if he did submit to the examination it was entirely voluntary."
>
> 32 A. L. R. 2d 445 (Anno.).
>
> "In the examination, appellant will not be required to vouch for anything. * * * Nothing will depend on his testimonial responsibility * * *. We do not undertake now to define the limits of such rights except to say that the authorities of that institution will not be permitted, over the protest of accused, to reveal any confession made by him in the course of such examination or declarations implicating him in the crime charged."
>
> State v. Myers, 200 So. Car. 309, 67 S.E.2d 506, 32 A. L. R. 2d 430 (anno.).

Other cases making similar statements are: State v. Grayson, 239 N. C. 453, 80 S. E. 2d 387 (cites many cases upholding statute but again says "no evidence of compulsion"); Hunt v. State, 248 Ala. 217, 27 So.2d 186 (Holds statute good because defendant not forced to submit.); Wymer v. People, 114 Colo. 43, 160 Pac.2d 987; People v. Strong, 114 Cal.App. 522, 300 Pac. 84 (Statute does not require him to submit); State v. Genna, 163 La. 701, 112 So. 635 (this defendant not forced to give evidence

against himself--only to be looked and spoken to); Comm. v. DStazio, 294 Mass. 273, 1 N.E.2d 189; Comm. v. Millen, 289 Mass. 441, 194 N.E. 463; Jessner v. State, 202 Wisc. 184, 231 N.W. 634 (only examination consistent with the constitutional rights of accused); McVeigh v. State, Fla., 73 So.2d 694 (passes on constitutionality but does not mention anything about testimonial compulsion); U.S. ex rel. Daverse, 198 Fed.2d 934 (good discussion of right of state to examine defendant); People v. Spencer, 60 Cal.2d 64, 383 Pac.2d 134; People v. Esposito, 287 N.Y. 389, 39 N.E. 2d 925, 142 A.L.R. 956; State v. Livingston, 233 S.Ct. 400, 105 S. E.2d 73; Early v. Tinsley, 286 Fed.2d 1, also Early v. People, 352 Pac.2d 112, 118; State v. Eastwood, 73 Vermont 205, 50 Atl. 1077; Rogers v. State, 222 Mass. 690, 76 So.2d 831; State v. Riggle (Wyo.), 298 Pac.2d 349; Comm. v. Butler, 405 Pac. 36, 173 Atl.2d 488 (not compelled to answer).

Thus, we see that the very decisions which uphold the constitutionality of the statutes indirectly disapprove of testimonial compulsion or forcing the defendant to answer questions.

The only two cases directly dealing with this point have been reported recently. One, the recent case of French v. District Court Division Nine,

152 Colo. 384, 384 Pac.2d 268, wherein the Supreme Court of Colorado directly refused to force a defendant to cooperate with psychiatrists and the other, the case of State v. Whitlow, 45 N. J. 3, 210 Atl.2d 763, which directly holds that the defendant may be required to cooperate.

In the case of French, supra, the defendant pleaded "not guilty by reason of insanity" and thereafter refused to cooperate with examining psychiatrists. The examiners notified the trial court that a determination of sanity or insanity could not be reached as the defendant "again would not furnish the examiner with any information about himself". The trial court, upon the motion of the District Attorney, ordered the plea of not guilty by reason of insanity stricken and ordered the case to be tried on the merits of the plea of not guilty. The defendant sought relief by prohibition or, in the alternative, mandamus. A rule to show cause was issued and the question before the appellate court was raised as follows:

> "Can a defendant who enters a plea of not guilty by reason of insanity at the time of the alleged commission of the crime, but who thereafter willfully refuses to cooperate and permit an examination of himself by physicians as prescribed by law, when said defendant is capable of cooperating in said examination, nevertheless maintain that plea and have a jury determination thereof?"

The appellate court answered this question in the affirmative and made the rule (prohibition) absolute, saying:

> "A person accused of a crime who enters a plea of not guilty by reason of insanity, cannot be compelled to carry on conversations against his will under the penalty of forfeiture of the defense for failure to respond to questions, or for a refusal to cooperate with persons appointed to examine him. The statute which prescribes the procedures to be followed upon the entry of a plea of not guilty by reason of insanity cannot operate to destroy the constitutional safeguards against self-incrimination."
>
> French v. District Court, Division Nine, supra.

Much extensive argument could be made beyond that already advanced but all of which would assume that petitioner finds herself in a position comparable to any of those in existence in the cases allegedly holding in her favor. In short, she cannot, by simply raising the "bogeyman" of alleged self-incrimination, hope to earn a review to which she is simply not entitled.

There has been raised here, of course, the allegedly ominous threat of self-incrimination--which indeed may have prompted this Court to inquire of

respondent as it has.

The Court may be assured that this fear exists only in the imagination of Mary Julia Parkin, the petitioner, and it has no existence whatever in reality. Whatever may have been the particulars surrounding the events leading up to the murder with which she is charged, she has undoubtedly made them known to her own psychiatrist (presumed to be one Dr. Ernest Miller). It is a certainty that she has declined to be that charitable with Dr. Hugh Ingram, the state's appointed psychiatrist. In any case, she no longer enjoys the right to clasp her secret only to her bosom and that of her counsel--if indeed she ever told him.

Said another way, there is no longer a question of self-incrimination or any privileged matter being extracted from her--by her act she has already established that as a claim impossible for her to make.

Are we seeking truth or do we hope for surprise? We submit that surprise can be the only purpose for the course of conduct followed by petitioner. As of January 1, 1968, the new rules of criminal procedure became law in Florida. Mary Julia Parkin has not yet been tried on the charge of murder in the first degree. When she is, both sides will have available to them all those things which the new rules provide shall be theirs. The office of the state attorney, under its authority to subpoena individuals whom it believes have evidence which would be

of interest to the state in criminal matters, undoubtedly will use that authority. In so doing, it is assumed that said office will seek statements from John R. Compton, Nancy Parkin, Christopher Parkin, Rebecca Parkin, Ramsey N. Shepherd, Jr., Mrs. Cressee French, James L. Mathas, Mrs. Iris Mount and Dr. Ernest Miller (witnesses ostensibly available for trial).

Assuming that Dr. Ernest Miller is the psychiatrist on whom she intends to rely, he, too, will be interrogated about everything he knows about the case. There is absolutely no basis upon which he or indeed any other witness (save and except the defendant) may decline to appear and give a statement or answer inquiries.

The Court's attention is invited to the specific provisions of Section 90.242 (3) (b), Florida Statutes, reading as follows:

> "(3) There shall be no privilege for any relevant communications under this section:
>
> * * *
>
> "(b) In a criminal or civil proceeding in which the patient introduces his mental condition as an element of his claim or defense, or, after the patient's death, when said condition is introduced by any party claiming or defending through or as a beneficiary of the patient."

Certainly this will be a criminal proceeding. Just as certainly as Mrs. Parkin introduced her mental condition as an element of defense, there can be no doubt but that Dr. Miller could be compelled to discuss every vestige of communication and information regarding those events which transpired during the course of his examination of Mrs. Parkin.

We ask, if it could be done in that fashion, what difference does it make that it is done in another fashion? She elected this as her defense and told the particulars of her activities to this doctor. It is not privileged information and must be divulged on demand by proper authority.

If harm, whether potential or otherwise, is the touchstone of petitioner's argument, then respondent respectfully submits that the harm is identical in every particular. This leaves as the only feature for which she can opt--the element of surprise. Obviously, she would be delighted to have the state attorney find out for the first time at trial just what, if anything, she said of the particulars of the crime. What should the trial judge then do? Perhaps declare a mistrial and later afford the state an opportunity to pose these facts to their psychiatrist thereby allowing him to take them into account when he conducts his physical and neurological examination of this woman? We would certainly hope not.

There is simply no way in which, under the existing law in this state, and in particular that of Section 90.242 (3) (b), supra, that petitioner can escape the truth and justice within. She is assured she will be tried. By electing to bare her soul to her chosen psychiatrist and seal her lips to the state's psychiatrist, whatever she tells her doctor has to become known to the prosecution before trial, whether as we contend it can be done or as she contends it ought not to be done.

That being the case, and surely it is, one must put aside the ominous spectre of forced self-incrimination. It is no longer the bogeyman that petitioner has sought to make it. In short, it is only resident in her imagination--not because it is not to her real but rather because it is just as real the other way.

The privilege against self-incrimination is one with which, of course, no court should deal lightly least of all this one. It must be remembered, however, that once an individual accused of a crime breaks his silence to someone other than his lawyer or spouse, he has made himself vulnerable to having those events about which he spoke used against him.

Of course, it might be said that if she did not put the particulars of her activities before her own psychiatrist, how in the name of good sense could she ever expect to put that matter before the trier of fact as a defense to the charge? We understand that she wants her doctor to know all of the particulars so that he can, in his good judgment, move the jury to find her not guilty because in his professional judgment, she did not know the difference between right and wrong when she killed her husband. We also understand that she does not have cast upon her shoulders the burden of equipping the state with the same amount of information so as to permit them to have their psychiatrist find that she was not so insane as to not know the difference between right and wrong.

Left her way, she would have the best of both worlds going in. The rub comes, however, when she must face the fact that when she told her psychiatrist of just what she did, the privilege against self-incrimination as to those utterances simply exists no more. A Hobson's choice? Perhaps so but one which she was free to make counseled as she was by a man of her own choosing.

Let us assume for the moment that the psychiatrist to whom she went and who heard all of the gory details found that she was indeed not insane and so advised her, may it fairly be said that if the State of Florida learned of this highly unusual turn of events, they could not

subpoena him to testify at her trial regarding her sanity? None but fools would suggest that this individual could not be so subpoenaed and be compelled to testify.

Adverting to our argument ante, it must be remembered that Section 90.242 (3) (b), supra, does not seal the lips of a psychiatrist in these circumstances. Indeed, if it does anything, it specifically excepts psychiatrists so situated.

There ought to be no reason whatever (judicial or otherwise) why this woman should be permitted to place before her own psychiatrist all of the factual particulars surrounding the murder that does not also exist as a compelling reason to do the same for the psychiatrist appointed by the court.

Who among us can deny that in virtually all instances, one's mental state is a matter for the subjective determination of an examining psychiatrist rather than the objective results of physical tests or neurological examinations? Is it possible that her psychiatrist is not gifted enough to be able to do this examination without the benefit of her description of her activities at the time in question and the state's doctors are? Indeed, the letter executed by Dr. Ingram and sent to Judge Durden clearly indicates and flatly states that it is impossible for him to

reach any conclusion without the co-operation of the petitioner in relating the factual circumstances giving rise to the matter in issue. That is simply an honest pronouncement of a man trying to carry out his assignment. He is not Merlin who, by simply waving his magic wand, can divine sanity without an utterance by petitioner. Obviously, Dr. Miller, who probably examined her for the defense, was himself not a Merlin but rather just an ordinary psychiatrist who had to have tools with which to work.

Terminally, we observe that the entire issue is simply mooted by the fact that everything she told her psychiatrist so as to enable him to make an intelligent assessment of her sanity (as to which she need only raise a doubt), is and always was available to the state even though they must establish her sanity either on rebuttal or otherwise beyond a reasonable doubt.

When she elected to divulge the course of conduct she followed at the time she committed the murder of her psychiatrist, she forever closed the door with regard to keeping those particulars secret from the state attorney. That being the case, and surely it is, there is absolutely no point in her complaint regarding how she feels she may be harmed if she is made to talk to the state's psychiatrist.

It is almost Hornbook law that neither her psychiatrist nor the state's psychiatrist can divulge anything with regard to her statements to them since it would be hearsay of an easily identifiable nature and would, of course, be impermissible. Apart from that the function of either or both of the medical experts is not to give evidence regarding her criminal complicity (if any) but simply to give their expert opinion with regard to whether she was in sufficient possession of her mental faculties at the time she committed this crime so as to know the difference between right and wrong.

It is an absolute certainty that the state will secure this information whether from her or her psychiatrist. We contend that it matters now not one whit that it comes one way rather than another.

Though petitioner would make much of the fact that the decision of the District Court of Appeal allegedly limiting the scope of the extent to which she might go at her trial with regard to the question of her sanity and that of the Supreme Court of Florida which she contends perhaps did even more harm to her should be reversed by this Court, respondent submits that nothing is further from the truth. All Florida has done is simply exercise a well recognized prerogative in determining just exactly how expert

witnesses must function in Florida's courts if they will be permitted to function at all. See Washington v. U.S., 390 F.2d 444.

The Washington case, supra, is as lucid a piece of judicial writing as your respondent has been privileged to read regarding the matter petitioner urges should become critical with this Court. Without elaborating on what that decision says, respondent observes that psychiatrists may be judicially circumscribed in the manner in which they must function in a court of law when insanity is an issue.

Is there anyone sitting on this or any other court who would honestly suggest that petitioner's psychiatrist could testify regarding petitioner's utterances to him? That would be hearsay to begin with and it would permit petitioner to put before the jury her alleged exculpatory statements (vis-a-vis her insanity) without having to run the risk of cross-examination or a possible charge of perjury. In short, she would like to have her psychiatrist tell it as (?) she would like it to be, secure in the knowledge that she would remain insulated from all of the travails normally following such a situation.

We also observe that the decision in McCullers, supra, would preclude her psychiatrist from testifying if the proffer shows as we suspect it will that his only encounter with regard to her sanity came from her lips and only hers. It is clear that Florida's Supreme Court was

never foolish enough to think that one can send a fox to guard the chickens. What defendant in his right mind would ever take the witness stand if he could have his psychiatrist put before the jury just what it was he wanted them to hear, knowing all the while that he would never lose the closing argument and never have to run the risks of an ordinary witness in an ordinary trial on an ordinary issue.

In truth and fact, Mary Julia Parkin wants to play a game in which there is no chance of losing. She wants either the element of surprise, which she tacitly admitted in oral argument before the Florida Supreme Court, or the ability to put before her jury the delightful prospect of having a highly reputable psychiatrist saying she was insane when she did in her husband and mockingly telling the jury that the State of Florida, with its vast resources, could not even find one doctor to say that she was not. Even assuming that we could find a doctor who was willing to hazard an observation regarding the lack of insanity, one can just imagine what petitioner's counsel would make of him on the stand when he would be forced to admit that he never even discussed the matter with the accused. After all, he would not be permitted to say that she refused to answer his questions or give him a factual breakdown of those events which occurred because to let him do so would be in effect to allow the State of Florida to comment on her failure to give responses to inquiries put to her and so it is that

it is Tweedledum or Tweedledee. Oh, no, if there is a Hobson's choice, it is one left to the State of Florida--assuming, of course, petitioner has her way and makes it impossible for justice to ever see the light of day, at least as to her case.

We again remind this Court that it is an absolute certainty that Florida will come by this information (what she told her psychiatrist) whether we get it from her directly to our psychiatrist or whether we get it from her psychiatrist on the business end of a subpoena. We say again that it ought not to matter that it is properly secured one way or another.

Surely this Court is more than busy enough without having to engage in the requested resolution of simple academic questions no one of which would provide petitioner with relief from the situation in which she must find herself at trial, whichever way one chooses.

CONCLUSION

Respondent respectfully submits that compelling petitioner to communicate orally with the state psychiatrists in no way violates her constitutional rights against self-incrimination as guaranteed by any amendments either to Florida's or the Nation's Constitution. Nor may it

be said that the judicial circumscription imposed against petitioner either deprives her of her right to make an insanity defense or results in a deprivation to her of any due process.' She is in no danger (not of her own independent making) of suggesting irreparable injury by being compelled to comply with the order of the court.

Respectfully submitted,

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Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded copies of the foregoing Response to Petition for Writ of Certiorari to petitioner's counsel, the Honorable Albert J. Datz, Datz & Jacobson, 320 First Bank & Trust Building, Jacksonville, Florida 32202, by mail, this _____ day of February, 1971.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel.